United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

76-4049

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 76-4049
76-4061
76-4074

ITT World Communications Inc.,
RCA Global Communications, Inc. and
Western Union International, Inc.,
Petitioners,

against

Federal Communications Commission
and United States of America,
Respondents,

American Telephone and Telegraph Company,
Xerox Corporation,
Hawaiian Telephone Company and
American Petroleum Institute,
Intervenors.

PETITIONS FOR REVIEW OF A REPORT AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER ITT WORLD COMMUNICATIONS INC.

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Preliminary Statement

Petitioner ITT World Communications Inc. ("ITT Worldcom") submits this brief in reply to the joint brief of the respondents, Federal Communications Commission ("FCC" or "the Commission") and the United States, and in reply to the briefs of intervenors American Telephone and Telegraph Company ("AT&T"), Xerox Corporation, American Petroleum Institute ("API") and Hawaiian Telephone Company.

At issue in this consolidated review proceeding[1] is a Report and Order in which the FCC determined that it would be in the public interest to permit intervenor AT&T to offer international alternate voice-data service in competition with ITT Worldcom and the other international record carriers ("IRCs").[2]

POINT I

THE OPPOSING BRIEFS FAIL TO DEMONSTRATE THAT THE ORDER DISTINGUISHES THE FCC's PRIOR TAT-4 DECISION ON A RATIONAL BASIS.

As the IRCs argued in their opening briefs, the FCC's Order must be reversed because the FCC's explanation of the divergence between its Order and its prior decision in the *TAT-4* case[3] makes no sense. In *TAT-4*, the FCC held that AT&T should be prohibited from offering alternate voice-data service in competition with the IRCs because its examination of the competitive inequalities between AT&T and the IRCs led it to the following conclusion:

> "It is in the public interest that we assure the viability of the record carriers by protecting them from the losses they would *inevitably* suffer were AT&T permitted to provide this voice-record service." 37 F.C.C. at 1159. (Emphasis supplied.)

In its Order, the FCC expressly declined to overrule its *TAT-4* decision, but purported to find that factual differences between it and the instant case made a different

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1. The Petition for Review brought by ITT Worldcom has been consolidated with similar petitions filed with the Court by two of ITT Worldcom's competitors, Western Union International, Inc. ("WUI") and RCA Global Communications, Inc. ("RCA Globcom").

2. The alternate voice-data service at issue here was described in ITT Worldcom's Brief at pp. 4-5.

3. *American Telephone and Telegraph Co.*, 37 F.C.C. 1151 (1964).

result appropriate. (A-6). The question before the Court is therefore whether the grounds the Order gave for distinguishing *TAT-4* are sufficient as a matter of law.[7]

A. The Opposing Briefs Fail to Show That the FCC Had Adequate Grounds for Distinguishing *TAT-4*.

The FCC's brief makes no effort to answer the precise legal issue stated above. In its Counterstatement of the Case, the FCC concedes that it has an established policy of preventing AT&T from offering international record services in competition with the IRCs:

> "The Commission has a longstanding general policy of separating voice and record services in international communications. The policy reflects history, technological evolution, and, to some extent, concern for the survival of the record carriers in direct competition with AT&T." FCC Brief, p. 4 (footnote omitted).

The FCC's argument is then devoted to establishing that the FCC is not prohibited from making exceptions to this general policy when the circumstances warrant such an exception.[8]

This argument is not responsive to the point made in the IRCs' briefs. The question here is not, as the FCC's brief suggests, whether the Commission is required to adhere rigidly to existing policy in every new case which comes before it. The question is whether the Commission has given an adequate explanation for its departure from precedent. Where, as here, the FCC choses to make an exception to the policies adopted in its prior decisions, without overruling those precedents, the courts have required the Commission to (1) articulate the factual differ-

7. ITT Worldcom Brief, pp. 19-24. There are no footnotes 4, 5 and 6.

8. FCC Brief, pp. 26-27.

ences between the case at hand and the precedents, and (2) explain how the purposes of the Communications Act will be furthered if the Commission reaches a different result on the basis of those factual differences.[9] On that key issue, the FCC's brief merely states in conclusory fashion that "the Commission adequately distinguished the *TAT-4* decision"[10] and refers the reader to a footnote in the FCC's Counterstatement. That footnote does no more than paraphrase the Order's brief discussion of *TAT-4* which, as ITT Worldcom demonstrated in its opening brief,[11] did not meet the FCC's responsibility to explain the difference in result between that case and this one.

Nor does AT&T, the only intervenor which attempts to justify the FCC's departure from *TAT-4*, succeed in establishing that the grounds the Order gave for distinguishing *TAT-4* were legally sufficient. AT&T argues first that AT&T and the IRCs are here proposing to offer different alternate voice-data services, while in *TAT-4* all the carriers were proposing the same type of service.[12]

9. *See, e.g., Columbia Broadcasting System, Inc.* v. *F.C.C.*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *Melody Music, Inc.* v. *F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965).

10. FCC Brief, p. 27.

11. ITT Worldcom Brief, pp. 22-24, and see pp. 4-6, *infra*.

12. For reasons which are somewhat obscure, the FCC suggests that §405 of the Communications Act prevents this Court from considering the IRC's argument that the FCC mischaracterized the record when it held that AT&T and the IRCs were not proposing to offer the same service. FCC Brief, pp. 30-3. The FCC misconstrues the statute:

> "On its face, §405, commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party." *Office of Communications of United Church of Christ* v. *F.C.C.*, 465 F.2d 519, 523 (D.C. Cir. 1972). *See also, Wilson & Co.* v. *U.S.*, 335 F.2d 788, 794 (7th Cir. 1964), *remanded on other grounds*, 382 U.S. 454 (1966).

Here, the FCC has not only been "afforded the opportunity to pass" on the question of whether AT&T and the IRCs were proposing identical services, it has actually decided the question—erroneously. Its decision is clearly reviewable by this Court.

Although AT&T attempts to refute the IRCs' demonstration that the record does not support this finding, AT&T can offer no better argument than a repetition of the Order's erroneous theory that because the IRCs were proposing to offer certain optional features *in addition* to basic alternate voice-data service, at additional cost to the customer, they were not proposing to offer the basic service to those customers for whom such service is sufficient.[13] AT&T does not even acknowledge that the Order, in a passage just prior to its discussion of *TAT-4*, contradicts its purported finding that the carriers would offer different services by recognizing that ITT Worldcom and RCA Globcom were proposing the same international service which AT&T proposes (*i.e.*, "basic dataphone-type services").[14]

Nor does AT&T attempt to explain why the *TAT-4* rationale should be applicable only when AT&T and the IRCs propose communications services which are precisely identical. AT&T's monopolistic competitive advantages, the grounds for the Commission's decision in *TAT-4*, will enable it to win the competitive battle whenever the IRCs offer services which are subject to replacement by AT&T's service, as is unquestionably the case here. AT&T is finally reduced to arguing that the IRCs must be offering a significantly different alternate voice-data service because they have not infringed AT&T's trademark by designating their proposed service "Dataphone".[15] A more meaningless distinction between the two services is difficult to imagine.

AT&T is no more successful in its attempt to demonstrate the significance of the second factual distinction the

13. AT&T Brief, pp. 13-18.

14. "AT&T alleges it can offer the basic dataphone-type services without making any significant additions or modifications to its public switched network. . . . By constrast, RCA and ITT estimate some additional investments and operating expenses will be associated with providing an international service similar to that which AT&T proposes. Despite these additional costs, the IRCs assert that their rates for such service will be comparable to those of AT&T for similar services." Order, A-5.

15. AT&T Brief, p. 16.

FCC purported to find below, *i.e.*, that the investment required to provide the new service at issue in *TAT-4* would have been the same no matter which carrier provided the service, whereas here, the IRCs will need to make a greater investment than AT&T. AT&T makes an effort to demonstrate that the record below supported the FCC's factual finding that an additional investment would be required as of the IRCs.[16] However, it fails to explain the relevance of differences in investment to the rationale of the *TAT-4* decision or to the purposes of the Communications Act. So far as the *TAT-4* rationale is concerned, the smaller investment required of AT&T is only one more competitive advantage for the monopolist which makes the reasoning of *TAT-4* more, rather than less, compelling here. And, as ITT Worldcom has pointed out,[17] the Commission did not find that the difference in investment levels would result in lower rates or any other public benefit which might justify the Order's departure from *TAT-4;* to the contrary, the FCC accepted without dispute the IRCs' assurances that both their rates and services for "basic" alternate voice-data service would be fully comparable with AT&T's. (A-5). AT&T has not shown, either below or in its brief, that its proposal to offer alternate voice-data service will result in any benefit to the public which would justify the FCC in distinguishing its *TAT-4* decision that AT&T should be kept out of the international alternate voice-data market.

16. AT&T Brief, pp. 33-34. It should be noted that AT&T makes no effort to establish the FCC even considered differences in the investments required of the carriers to be a relevant factor when it made its *TAT-4* decision. To the contrary, the FCC in *TAT-4* contemplated that in order to provide AVD service the IRCs would need to acquire facilities to interconnect their networks with AT&T's —the precise form of "additional investment" which the IRCs will need to make here. See *TAT-4*, 37 F.C.C. at 1158, 1160; ITT Worldcom Brief, p. 22.

17. ITT Worldcom Brief, pp. 23-24.

B. AT&T's Brief Improperly Attempts to Sustain the FCC's Decision on Grounds Not Relied Upon Below.

Since, as the foregoing discussion demonstrates, the FCC's attempt to distinguish *TAT-4* cannot be sustained on the grounds set forth in the Order, the Order must be reversed. It is, of course, an established principle of administrative law that an agency's decision must be affirmed or reversed on the grounds on which that decision relies, and that the Court may not consider arguments in support of the decision which are made for the first time on appeal.[18] AT&T, however, fails to heed this fundamental rule, and improperly asks this Court to affirm the Order on the basis of a multitude of arguments which the FCC either never considered or actually rejected in its Order. Moreover, AT&T's arguments, even if properly before the Court, would not be sufficient to sustain the FCC's decision.

1. *AT&T Improperly Argues that TAT-4 Was Wrongly Decided.*

AT&T argues that the FCC's Order should be affirmed because the *TAT-4* precedent itself was wrongly decided.[19] The Order, however, explicitly declined to overrule *TAT-4*, and, indeed, reaffirmed the continuing vitality of that decision. (A-6).

AT&T's attack on the *TAT-4* decision is, in any event, without substance. As ITT Worldcom demonstrated in its opening brief,[20] the FCC's decision in *TAT-4* was based upon a factual determination that AT&T's "vast nationwide domestic network and its large sales force"[21] gave it a decisive competitive advantage over the IRCs, which

18. *See, e.g., S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *U.S.*, 371 U.S. 156, 168-169 (1962); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419 (1971); *Grace Line, Inc.* v. *F.M.B.*, 263 F.2d 709, 711 (2d Cir. 1959).

19. AT&T Brief, pp. 31-33.

20. ITT Worldcom Brief, pp. 8-11, 21-22.

21. 37 F.C.C. at 1158.

had smaller resources and were restricted to doing business in a small number of "gateway" cities. AT&T's brief questions the significance of only two of the many factors which led the FCC to this conclusion: (1) the confinement of the IRCs to the gateways and (2) the substantial competitive advantage AT&T has over the IRCs in terms of advertising resources.

AT&T urges that the *TAT-4* rationale has lost vitality because the IRCs are now doing business in two additional gateway cities and may at some unknown time in the future be permitted to add additional gateways. Putting aside the fact that the FCC's Order did not rely on actual or prospective changes in the number of gateways as a reason for distinguishing *TAT-4*, it is clear that increases in the number of gateways can have little effect on the competitive inequality between AT&T and the IRCs which the Commission perceived in *TAT-4*. Even if the IRCs' pending applications for authority to operate in additional gateways are granted—and there is no assurance when, or if, that authorization will be forthcoming—the IRCs will still be legally confined to doing business in a limited number of cities, and they will still be completely dependent on AT&T's domestic network to complete alternate voice-data calls in the vast hinterland beyond the gateways. No matter how many gateways the IRCs are ultimately authorized to use, they will never be able to match the competitive advantage AT&T enjoys as the result of its monopoly control over the interstate telephone network, which reaches into the home and office of every potential alternate voice-data customer.

Continuing its attack on the *TAT-4* decision, AT&T attempts to establish that *TAT-4* was wrong in finding that AT&T possessed advertising and marketing resources greatly superior to the IRCs.[22] Once again, AT&T is improperly attempting to explain the FCC's departure from *TAT-4* on a ground not set forth by the Order, and, more-

22. AT&T Brief, pp. 32-33.

over, it bases its argument on data which are not in the record below. However, rather than establishing competitive equality between AT&T and the IRCs, AT&T's statistics on advertising expenditures dramatically illustrate the differences in advertising resources which were an important factor in the Commission's *TAT-4* decision. AT&T's figures indicate that even though AT&T has not yet chosen to devote more than a miniscule fraction of its huge income to advertising, it nevertheless outspends the entire ITT corporate family by nearly fifty percent.[23] AT&T's brief thus demonstrates that even if one aggregates the amounts ITT spends to advertise products and services like Wonder Bread, Hostess Twinkies and Sheraton Hotels—advertising which obviously does little to sell international communications services—the total amount is still far less than the amount AT&T spends for advertising, almost all of which is to promote the use of its communications services. This is hardly a reason for questioning the wisdom of the *TAT-4* decision.

AT&T's final effort to attack the *TAT-4* decision, rather than address the relevant issue of whether the instant case is distinguishable from that precedent, is to suggest that the threat to the IRCs which the Commission perceived in *TAT-4* did not actually exist, because the introduction of international AVD service by the IRCs themselves has had no adverse effects on the IRCs' existing services[24]. The premise of AT&T's argument—which it relegates to a footnote[25]—is that the introduction of AVD service by the IRCs has had the same impact on the IRCs' existing services as

23. AT&T's Brief, p. 33, n. 79, states that AT&T spends $0.28 per $1,000 of sales on advertising, while ITT spends $6.4 per $1,000 of sales. Even though ITT's advertising effort is thus over twenty times more burdensome in terms of the fraction of income diverted, AT&T's vastly larger sales permit it to spend nearly fifty percent more than ITT in absolute amounts, *i.e.*, $101.7 million for AT&T compared to $73.1 million for ITT.

24. AT&T Brief, pp. 40-41.

25. AT&T Brief, p. 41, n. 100.

would have occurred had AT&T been authorized to offer AVD service. In other words, AT&T's argument depends on an assumption that AT&T would have been just another competitor in the international AVD market. To state that assumption refutes the argument, since it ignores the basic rationale of *TAT-4* that AT&T's domestic monopoly would have permitted it to compete unfairly with the IRCs' existing services. This last-ditch attempt to undercut the significance of the *TAT-4* decision rests on faulty logic.

2. *AT&T Improperly Attempts To Distinguish TAT-4 On A Factual Basis Upon Which The FCC Did Not Rely*

AT&T's attempts to distinguish the facts of this case from *TAT-4*, like its efforts to discredit that precedent, rely on grounds which were not used by the FCC to explain its Order and therefore cannot properly be used to support its decision here.

AT&T seeks to distinguish this case from *TAT-4* on the ground that the alternate voice-data service at issue here is a so-called "switched-message" service rather than a "private-line" service.[26] The FCC neither relied upon this distinction below nor found that AT&T's monopolistic competitive advantages, which mandated the result reached in *TAT-4*, would be any less insuperable if alternate voice-data service were offered on a switched-message basis, rather than as a private line service. Nor, for that matter, does AT&T's brief attempt to explain why the competitive considerations which were the basis for excluding it from the international alternate voice-data market in *TAT-4* are not equally applicable to both switched and private-line services. Instead, AT&T argues that (1) because the alternate voice-data service at issue here is a switched service it is necessarily part of AT&T's message toll service ("MTS") monopoly and (2) the Commission's decision to

26. AT&T Brief, p. 27.

follow a purported policy of "liberalized use of MTS"[27] explains its departure from *TAT-4*.

AT&T's tenuous theory is supported by neither the Order nor the precedents AT&T cites. First, AT&T's assertion that alternate voice-data service is necessarily a part of its MTS monopoly is merely a statement of the result AT&T wishes the FCC to adopt. It is by no means inevitable that alternate voice-data service will be provided by AT&T as part of its communications monopoly rather than as a service of the competitive IRCs; indeed, that is the basic question at issue here. Secondly, the FCC does not have a policy of permitting AT&T to expand its MTS monopoly to the fullest possible extent, as AT&T's brief seeks to imply. To the contrary, the three administrative decisions[28] from which AT&T purports to distill such a policy actually *restricted* the scope of AT&T's monopoly. These three cases all dealt with AT&T's efforts to make manufacturing of telephone equipment part of its MTS monopoly, by preventing its customers from using telephone equipment not built by AT&T's subsidiary, Western Electric. By rejecting AT&T's restrictions on the installation of competitors' equipment, the FCC established a policy, not of expanding AT&T's monopoly, but rather of limiting AT&T's attempts to expand its monopoly into related areas where competition might otherwise flourish. The FCC applied this policy of limiting the scope of AT&T's monopoly in other cases—including the so-called specialized common carrier decisions[29] and the *TAT-4* decision itself—before rejecting the IRCs' request that it be

27. AT&T Brief, p. 27.

28. *Hush-A-Phone Corp.* v. *American Telephone & Telegraph Co.*, 22 F.C.C. 112 (1957), on remand from *Hush-A-Phone Corp.* v. *U.S.*, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 F.C.C.2d 420 (1968); *Interstate and Foreign Message Toll Telephone Service*, 58 F.C.C.2d 736 (1976).

29. *E.g.*, *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969); *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington U.&T. Comm.* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), *cert. den.*, 423 U.S. 836 (1975).

applied here. Moreover, as the FCC's brief admits, the FCC has an established policy of precluding AT&T from offering record services—a policy based "to some extent" on "concern for the survival of the record carriers in direct competition with AT&T".[30] Thus, to the extent that an examination of the FCC's general policies is relevant to the question of whether the FCC's Order adequately distinguished the facts of the instant case from *TAT-4*, those policies support, rather than refute, the IRCs' arguments that the Commission's departure from *TAT-4* was unjustified.

POINT II

THE OPPOSING BRIEFS FAIL TO DEMONSTRATE THAT THE COMMISSION HAS MET ITS RESPONSIBILITY TO CONSIDER THE EFFECT OF ITS ORDER ON THE PUBLIC.

The IRCs' briefs demonstrated that, wholly apart from the question of whether the FCC met its responsibility to distinguish the *TAT-4* decision, the FCC failed to articulate any public benefit to be obtained from its choice of a monopolistic over a competitive market structure and failed to consider the adverse effect its decision would have on competition in the international record communication industry generally, or on competition to offer the particular alternate voice-data service at issue here.[31]

A. The Opposing Briefs Fail to Offer Any Justification for The FCC's Choice of Monopoly Over Competition.

Conspicuously absent from all of the opposing briefs is any attempt to justify the FCC's failure to require AT&T to demonstrate that its monopoly could provide the public with some benefit which the IRCs could not match—by

30. FCC Brief, p. 4.

31. See ITT Worldcom Brief, pp. 25-40.

offering better service, by lowering rates or by meeting a demand which could not otherwise be met[32]—as a prerequisite to permitting AT&T to enter the international alternate voice-data market. As ITT Worldcom's brief describes,[33] the FCC accepted the IRCs' assurances that in competition with one another they could provide service as good or better than AT&T, at comparable rates, if AT&T were prohibited from offering competing service. Yet the FCC inexplicably chose a monopolistic market dominated by AT&T over a market structure which would have permitted competition, without articulating any public benefit it believed would result from its choice.

As ITT Worldcom demonstrated in its brief, the Commission has a well-established duty to assess the competitive implications of its actions and at least consider "a policy of facilitating competitive market structure and performance"[34] before choosing an alternative which is restrictive of competition. The opposing briefs fail to reconcile the FCC's unexplained preference for monopoly over competition with the Commission's duty to promote, if possible, the national policy in favor of competitive markets.[35] Instead, the FCC and intervenor Hawaiian Tele-

32. The decision on which AT&T and the FCC principally rely, *Radio Relay Corp.* v. *F.C.C.*, 409 F.2d 322 (2d Cir. 1969), is distinguishable from the instant case in this and other respects. In that case, the Commission found that the smaller carriers competing with AT&T could not adequately supply the demand for the radio paging service at issue. This inability of the independent carriers to meet the need for additional service was a public interest consideration favoring AT&T which is not present here. See 409 F.2d at 326.

33. ITT Worldcom Brief, pp. 26-28.

34. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974). And see the other authorities cited in the ITT Worldcom Brief at p. 25, n. 41 and p. 35, n. 53.

35. The FCC's brief seeks to mischaractize the IRCs' position as an argument that the Commission must place preservation of competition ahead of all other public interest considerations, no matter how compelling. FCC Brief, pp. 22-23. ITT Worldcom explicitly recognized that "the preservation of competition in a regulated industry is not to be equated *per se* with the furtherance of the public interest." ITT Worldcom Brief, p. 25. However, as ITT Worldcom pointed out, this is not to say that the Commission may simply ignore the public interest in promoting competition, as it has done here.

phone make the unresponsive argument that meeting the customer's need for alternate voice-data service is the "overriding" concern.[36] That argument merely established a point not in dispute here, that there is a need for alternate voice-data service. There is, however, no question that the need for alternate voice-data service will be met;[37] the question is only whether it will be provided by AT&T or the IRCs.

AT&T's brief, relying on a phrase from the *Hush-A-Phone* decision,[38] argues that permitting it to offer international alternate voice-data service would be "privately beneficial without being publicly detrimental." AT&T's use of this phrase is somewhat ambiguous. If AT&T is merely intending to observe, as did the court in *Hush-A-Phone,* that the private citizen should be allowed to use his telephone to his maximum personal advantage, then AT&T is simply urging a variant of the argument made by the FCC

36. FCC Brief, p. 24; Hawaiian Brief, p. 6.

37. Xerox's brief contains a long, irrelevant and inaccurate discussion of the deficiencies it claims exist in the IRCs' present Datel services. Xerox's discussion does not contain a single record citation, and it would appear that Xerox believes this Court decides cases on the same basis as the FCC, by notice and comment, rather than confining its consideration to the record below.

This is not the forum to respond to Xerox's complaints about Datel service. However, it should be noted that: (1) many of the allegations Xerox makes are completely erroneous. For example, the Xerox Brief alleges, at p. 3, that Datel messages must be recorded by the IRC and then retransmitted to the overseas recipient. This is factually incorrect; the IRC establishes a circuit from sender to recipient and the Datel message may be transmitted directly between them, without the "stop over" Xerox describes; (2) Xerox's argument is only that there are deficiencies in the IRCs' existing Datel service, and Xerox does not deny that the IRCs' proposed new alternate voice-data service will be fully comparable to AT&T's, as the FCC has found; and (3) the deficiencies in Datel alleged by Xerox are, for the most part, the result of AT&T's refusal to grant the IRCs adequate interconnection with its domestic network. Obviously, AT&T should not be rewarded here for its efforts to undercut Datel service, nor should the IRCs be penalized for this factor beyond their control.

38. *Hush-A-Phone Corp.* v. *U.S.*, 238 F.2d 266, 269 (D.C. Cir. 1956) quoted in the AT&T Brief at p. 27.

and Hawaiian Telephone that the Order should be affirmed because it meets a need for alternate voice-data service. This argument, like the argument of FCC and Hawaiian, is not relevant to a choice between carriers, since there is no dispute that the IRCs will offer the telephone user an even more flexible form of alternate voice-data service than AT&T proposes.

If, however, AT&T has taken this phrase out of context to argue that its alternate voice-data proposal should be approved because it is "privately beneficial" to AT&T but not "publicly detrimental", AT&T fails to recognize the affirmative duty of an administrative agency to promote the policies of the antitrust laws and to explore the public benefits, if any, warranting a choice of monopoly over competition.[39] In effect AT&T is espousing the burden-of-proof analysis erroneously relied upon by the FCC in its Order, which permits a monopoly to expand without demonstrating that any public benefit will be achieved thereby, unless and until the victims of its expansion can prove a public detriment. The error of this reversal of the burden of proof was pointed out in ITT Worldcom's brief at pp. 33 *et seq.*

B. The Opposing Briefs Fail to Demonstrate that the FCC Properly Deferred Consideration of the Interconnection and Cross-Subsidization Dangers Inherent in its Decision to Admit AT&T to the International Record Communications Industry.

Because it rejected the alternative of permitting the IRCs to provide basic alternate voice-data service in competition among themselves without injecting AT&T into the market, the FCC was required to consider the danger that AT&T would misuse its huge monopoly resources to cross-subsidize the alternate voice-data service it would offer in competition with the IRCs[40], and to deny the interconnection

39. See the cases cited in the ITT Worldcom Brief at pp. 34-37.

40. ITT Worldcom Brief, pp. 28-32.

arrangements which were essential to the IRCs' proposals to offer alternate voice-data service.[41]

The opposing briefs attempt to justify the FCC's decision to defer consideration of the cross-subsidization and interconnection issues by arguing that an administrative agency has discretion to "control its own dockets and to resolve subordinate question of procedure, such as the scope of an inquiry."[42] This appeal to an administrative agency's traditional freedom to choose the order in which it will hear unrelated cases is not, however, responsive to the thrust of the IRCs' arguments. What the Commission has done here is not to defer consideration of a discrete, independent issue until some future date, as the opposing briefs suggest. Instead, the FCC has refused to consider two issues which are integral factors in the decision it was purporting to make, that AT&T's entry into the international record industry should not be barred by competitive considerations. It was simply impossible for the FCC to make any assessment of the competitive implications of its decision without an adequate examination of the possibility that AT&T would destroy competition through monopolistic cross-subsidization and interconnection practices. Even the FCC's brief concedes that the interconnection issue is crucial to assessing the IRCs' ability to compete with AT&T:

> "Just what kind of services they [*i.e.* the IRCs] may offer depends in large part on resolution of the interconnection question." FCC Brief, p. 21, n. 23.

The FCC's failure to consider either of the two anti-competitive practices which the IRCs alleged AT&T would adopt represents a total failure to address the Order's adverse impact on competition among the carriers to offer alternate voice-data services. The FCC has therefore failed

41. ITT Worldcom Brief, pp. 32-33.

42. FCC Brief, p. 28; See also AT&T Brief, p. 19.

to meet its duty to consider the effect of its decision on competition.[43]

C. AT&T Improperly Argues that Cross-Subsidization Cannot Result From Its Authorization to Offer Alternate Voice-Data Service.

AT&T attempts to justify the Commission's failure to consider the cross-subsidization issue by arguing that it cannot use its MTS monopoly to subsidize its international Dataphone service. It suggests that cross-subsidization is impossible because the Dataphone user pays the same message toll as a customer who uses his telephone solely for voice conversations.[44] Since the FCC did not explain its refusal to investigate the cross-subsidization issue by deciding that AT&T lacked the ability to cross-subsidize its Dataphone service, this argument is another improper attempt by AT&T to justify the FCC's decision on grounds not relied upon by the agency.

In any event, AT&T's argument is without merit, since AT&T can use its huge MTS revenues to cross-subsidize international Dataphone whether the rates for the two services are identical or different. The cross-subsidization could take the form of an aggressive Dataphone sales

43. Hawaiian Telephone attempts to mischaracterize the interconnection and cross-subsidization issues. Hawaiian suggests that the IRCs are arguing for an equalization of competition between themselves and AT&T. Hawaiian Brief, p. 12. However, even if the IRCs receive the interconnection arrangements they are seeking, they will never be able to compete on a par with AT&T, since they will never enjoy the competitive advantages AT&T possesses as a result of its domestic monopoly. It is precisely because there can be no equality in competition between AT&T and the IRCs that AT&T's proposal to offer alternate voice-data services raises such a significant competitive question and presents the FCC with a choice between a monopolistic and competitive market structure.

44. See AT&T Brief, pp. 21-23. AT&T makes a frivolous argument that the cross-subsidization issue was not presented to the Commission below and therefore may not be urged on appeal. *Cf.*, 47 U.S.C. § 405. The cross-subsidization issue was, however, clearly raised by ITT Worldcom in its pleading before the agency. *See, e.g.*, A-86, A-92, A-293.

effort, financed by MTS revenues (which was the sort of unfair activity considered in *TAT-4*), or AT&T could use its MTS revenues to finance an upgrading of the international circuits it uses for both voice and Dataphone service, to make data transmission more reliable. These improvements will be financed in large part by the voice customer even though the existing circuits are perfectly adequate for voice use.[45]

AT&T's brief argues that such cross-subsidization is permissible because the residential customer, who needs and desires only a voice capability, "makes a less advantageous use of his telephone" than the international businessman who uses his phone for both voice and data transmission.[46] In effect, AT&T is arguing that because the small residential customer is dependent on AT&T for MTS voice service, he may properly be required to pay more for telephone services to help finance an improvement of AT&T's circuits so that AT&T can compete more effectively with the IRCs. All AT&T offers the voice user in return is the opportunity to use "his phone to greater advantage," by giving him a data-transmission capability he neither wants nor needs. AT&T's position is thus a blatant argument in favor of cross-subsidization by a monopolist, which certainly cannot excuse the Commission's failure to consider the cross-subsidization issue.

D. The Opposing Briefs Failed to Demonstrate That the FCC Adequately Considered the Impact of Its Decision on Competition in the International Record Industry Generally.

As the foregoing discussion illustrates, the opposing briefs have failed to show that the FCC made any real effort to deal with the principal competitive issue raised by its decision, *i.e.*, the question of how AT&T's authorization to offer alternate voice-data service internationally would

45. See ITT Worldcom Brief, pp. 14-15.

46. AT&T Brief, p. 23.

affect competition among the carriers to provide that particular communications service. There was, however, a secondary competitive issue raised in the proceeding below. Since AT&T's Dataphone service is, to some extent, interchangeable with the IRCs' existing services, including telex, the FCC was required to consider the danger that AT&T will use cross-subsidization and other anticompetitive practices to compete unfairly with the full range of traditional IRC services.

In contrast with its decision to completely ignore the effect of its Order on competition to provide the new alternate voice-data services, the FCC at least acknowledged the issue of the Order's impact on existing IRC services. However, the FCC disposed of the question improperly, by placing the burden on the IRCs to prove that their existing services would be injured by AT&T's Dataphone service and then holding that the IRCs had not met that burden.[47]

AT&T's brief urges the Court to accept the Commission's burden-of-proof resolution of this issue, but it does not even address ITT Worldcom's arguments that the Commission's approach was improper because (1) the Commission was requiring, without notice, that the IRCs demonstrate an effect the Commission itself had deemed "inevitable" in *TAT-4;* (2) a burden-of-proof analysis is not a proper concept to apply in a notice-and-comment proceeding; and (3) competitive issues, and the public interest in vindicating the policies of the antitrust laws, require active and affirmative investigation by the Commission.[48] Instead, AT&T simply asks the Court to ignore the clear import of the FCC's words and hold that the Commission did not in fact place the burden of proof on the IRCs.[49]

47. "Despite the opportunity granted to them by this inquiry, the IRCs have not justified their allegation that they would suffer a significant decline in Telex and AVD service such as to have a substantial adverse effect upon the provision of their services to the public." Order, A-7.

48. ITT Worldcom Brief, pp. 33-38.

49. AT&T Brief, p. 39.

AT&T's brief again attempts to uphold the FCC's result on a theory different from that relied on by the agency, by arguing that the introduction of alternate voice-data service in other markets has not affected the competitive status of telex services. AT&T points to (1) the introduction of AVD services by the IRCs after *TAT-4*, (2) the introduction of Dataphone service between the United States mainland and Hawaii, and (3) the introduction of Dataphone within the continental United States.[50] There is, however, nothing in the record to indicate that the three instances to which AT&T alludes are analogous to AT&T's proposal to offer international Dataphone service.

The first situation AT&T cites, the introduction of AVD service by the IRCs, has already been discussed. See pp. 9-10, *supra*. Obviously, the introduction of AVD service, rather than Dataphone service, by a group of IRCs which have neither AT&T's ability nor its incentive to drive telex service out of the market, can have little predictive value here.[51] The other two instances did involve the introduction of Dataphone service, but in markets which are quite different from the one with which the Order was concerned. Communication service between the mainland and Hawaii is too small a segment of the total international communications market to serve as a reliable indicator of the impact the introduction of international Dataphone service will have on the IRCs, especially since the competing carriers play somewhat atypical roles in providing

50. AT&T Brief, pp. 40-41.

51. The AVD service at issue in *TAT-4* actually was a lesser competitive threat to the IRCs than AT&T's Dataphone service, since AVD, even if cross-subsidized by AT&T, would only have been attractive to those customers whose communications volumes between two points were sufficient to justify leasing a private circuit. AT&T's Dataphone service, by contrast, could be used to compete for all the IRCs' customers, no matter how small the volume of their messages.

communications services to Hawaii.[52] However, to the extent an examination of the Hawaii-mainland market is relevant, the recent data suggests that competition from AT&T's Dataphone service has adversely affected the IRCs' ability to market their telex services.[53]

Nor is the situation within the continental United States an acceptable model for predicting the impact of international Dataphone service on the IRCs' telex services. Within the United States, telex is offered as an exclusive service of the Western Union Telephone Company,[54] which, as another monopolist, can compete with AT&T on a more nearly equal basis than the several competitive IRCs. In addition, AT&T's domestic Dataphone service is offered subject to certain restrictions which significantly reduce the competitive threat to Western Union. See ITT Worldcom Brief, p. 5. Moreover, the FCC recognized in its Order (A-8) that the IRCs were primarily concerned with the long-term future effect AT&T's Dataphone service would have on international telex, a question these three examples of past experience could not answer even if their facts were more nearly analogous.

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52. The traditional distinctions between the roles of AT&T and the IRCs have been blurred in the case of Hawaii-mainland communications. *See, Hawaiian Telephone Co.* v. *F.C.C.*, 498 F.2d 771, 772-73 (D.C. Cir. 1974); and see the FCC Brief, p. 6, which describes the structure of the Hawaii-mainland communication market as "unique."

53. The recent reports filed by the IRCs on FCC Form 903 and FCC Form 43.61, indicate that total international telex traffic grew at a rate of 14.6% during 1975. However, the volume of telex traffic between the mainland and Hawaii was virtually stagnant, showing an increase of only 1.2% during the same period.

The AT&T Brief, p. 41, attempts to prove a rapid growth of mainland-Hawaiian telex service by comparing recent volumes to the small amount of traffic which was carried when the service was in its infancy. Obviously, such figures are of little value in analyzing the current competitive situation in the mainland-Hawaii market.

54. *See, The Western Union Telegraph Co.*, 24 F.C.C. 2d 664 (1970).

Finally, even if the FCC had properly considered the effect of AT&T's Dataphone service on the IRCs' existing services, its competitive analysis would still be inadequate, because the FCC completely failed to address the primary competitive question before it, the impact of AT&T's Dataphone service on competition to offer the new alternate voice-data services.

POINT III

THE INTERVENORS IMPROPERLY ARGUE THAT THE ORDER IS NOT RIPE FOR JUDICIAL REVIEW.

The FCC's brief expressly recognizes that it is appropriate and timely for this Court to review the question of whether the Commission erred when it decided that AT&T should not be excluded from offering international alternate voice-data service in order to preserve competition in the international record communications industry.[55] Nevertheless, intervenors AT&T and API argue that the Commission's Order is not yet ripe for judicial review.[56]

The intervenors' ripeness argument consists of the following two points: (1) the Order is unreviewable because it is a statement of policy and (2) the Order is unreviewable because it will not be implemented until AT&T files an application pursuant to Section 214 of the Communications Act for authorization to offer alternate voice-data service. These arguments misconceive the substantive effect of the FCC's decision. This is not a case in which the FCC has

55. FCC Brief, pp. 19-22.

56. AT&T Brief p. 45; API Brief, p. 14. Apparently, neither of these intervenors argues that the Order is not reviewable because it is non-final in the sense that it is interlocutory; there is no dispute that the Order is the culmination of the proceeding in which it is entered. The intervenors instead argue that the Order does not have a sufficiently direct impact on the IRCs to make it ripe for judicial review, and that the Court in its discretion should postpone review pending further action by the agency.

simply adopted general policy considerations to govern its subsequent substantive proceedings.[57] Instead, the FCC has rejected, finally and on the merits, the major substantive arguments which the IRCs would have made to oppose AT&T's Section 214 application.[58] Thus, if the Order is permitted to stand, the FCC's consideration of AT&T's application, and the IRCs' efforts to obtain comparative hearings on their own competing applications, will be decided much differently than if the Order is reversed.[59]

Under such circumstances the Order is "ripe" for judicial review. As the District of Columbia Circuit has stated, "when the Commission adopts a procedure which precludes a true comparative hearing of conflicting applications, review may be sought here without awaiting a grant of one of the applications."[60] This principle was applied in *Citizens Communications Center* v. *F.C.C.*, 447 F.2d 1201, 1205

57. Compare, with the instant case, *Radio Relay Corp.* v. *F.C.C.*, *supra*, on which AT&T's ripeness argument relies. In *Radio Relay*, the FCC did not finally decide competitive issues prior to the filing of Section 214 applications, as it has done here. Instead, the FCC merely set aside a certain radio frequency for the telephone company's use in any locality in the nation in which it might ultimately be authorized to offer radio paging service. 409 F.2d at 327. When the telephone company filed an application for authority to offer the service "in a specific geographic area," the Commission proposed to give competitive questions plenary consideration "in the context of the specific and concrete market situation presented" in that particular community. 409 F.2d at 327.

58. The agency's characterization of its decision as a policy-making determination—which by definition would have no binding effect on subsequent proceedings—is not binding on the Court. *Columbia Broadcasting System, Inc.* v. *U.S.*, 316 U.S. 407, 416 (1942); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2nd Cir. 1972); *See generally, Pacific Gas & Electric Co.* v. *F.P.C.* 506 F.2d 33, 36-40 (D.C. Cir. 1974).

59. Unless the Order is reversed, it is by no means certain that the FCC can be required to reconsider its decision in the course of its consideration of the carriers' formal applications. *Cf., e.g. WAIT Radio* v. *F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

60. *Midwestern Gas Transmission Co.* v. *F.P.C.*, 258 F.2d 660, 666 (1958), *vacated on other grds.*, 358 U.S. 280 (1959); *see also, Phillips Petroleum Co.* v. *F.P.C.*, 475 F.2d 842, 847-48 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

(D.C. Cir. 1971) to permit review of a policy statement which would have improperly denied applicants a full comparative consideration of their subsequent applications.

Moreover, this case meets the ripeness requirements the courts have set for review of administrative decisions outside the comparative hearing context. The questions of whether the Commission properly distinguished its precedents and adequately considered the competitive implications of its decision are (1) purely legal issues which (2) will not be further illuminated by subsequent agency proceedings.[61] As the FCC's brief points out,[62] postponing review will work a "hardship to the parties,"[63] since they will be forced to plan their future conduct without knowing whether the Commission's decision will ultimately be reversed. And as this Court has recognized, these considerations favoring immediate judicial review are particularly compelling where, as here, a case involves a fundamental restructuring of an industry.[64]

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61. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); *Phillips Petroleum Co.* v. *F.C.C.*, *supra*, 475 F.2d at 847-48; *Citizen Communications Center* v. *F.C.C.*, *supra*, 447 F.2d at 1205; *National Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689, 694-696 (D.C. Cir. 1971); *Aquavella* v. *Richardson*, 437 F.2d 397, 403-404 (2nd Cir. 1971).

62. FCC Brief, p. 22, n. 24.

63. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149. See also the other authorities cited *supra*, n. 61.

64. *PepsiCo., Inc.* v. *F.T.C.*, 472 F.2d 179, 187 (2nd Cir. 1972), *cert. den.*, 414 U.S. 876 (1973).

CONCLUSION

For the reasons stated above and in the opening briefs of ITT Worldcom,[65] RCA Globcom and WUI, the FCC's Report and Order should be reversed.

Dated: New York, New York
September 27, 1976

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65. It should be noted that neither the FCC nor any of the intervenors addresses the point made by ITT Worldcom in its opening brief, at pp. 42-48, that the Order must be reversed because the FCC attempted a final resolution of the competitive issue raised by the IRCs in a policy-making proceeding, without giving any notice to the competing carriers that it intended to reach such a substantive result. This error constitutes a fundamental defect in the FCC's procedure below. As this Court observed in an analogous case:

> "A party's right to know what issues of interest to him may be determined in a proceeding in which he is participating is an absolute requisite of elemental fairness." *Mohawk Airlines, Inc.* v. *C.A.B.*, 412 F.2d 8, 13 (2d Cir. 1969).

CERTIFICATE OF SERVICE

I hereby certify that the attached document has been served on the attorneys for all parties to this action. Copies were served by first class mail, postage prepaid, on the following parties at the listed addresses:

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